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No. 02-132

IN THE

Supreme Court of the United States

MOBIL CORPORATION and HONEYWELL INTERNATIONAL, INC.,
Petitioners,

v.

BRUCE W. ADKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF RESPONDENT PREMISES OWNER AND EMPLOYER DEFENDANTS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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PARTIES JOINING IN THIS BRIEF

The premises owner and employer defendants joining in this Brief are Respondents Aristech Chemical Corporation, Bayer Corporation, Duquesne Light Company, E. I. du Pont de Nemours and Company, The Goodyear Tire and Rubber Company, Monongahela Power Company, Pennzoil-Quaker State Company (sued as Quaker State Corporation), Pharmacia Corporation (formerly known as Monsanto Company), Potomac Edison Company, West Penn Power Company, and Westvaco Corporation.

CORPORATE DISCLOSURE STATEMENTS

Respondent Aristech Chemical Corporation is a wholly owned subsidiary of Sunoco, Inc. (R&M). Sunoco, Inc. (R&M) is, in turn, a wholly owned subsidiary of Sunoco, Inc.

Respondent Bayer Corporation's parent is Bayer AG. No publicly held corporation owns 10% or more of Bayer Corporation's stock.

Respondent Duquesne Light Company states that its parent corporation is DQE, Inc., which is the only publicly held company which owns more than 10% of its stock.

Respondent E. I. du Pont de Nemours and Company ("DuPont") has no parent corporations, and no publicly held companies own 10% or more of DuPont's stock.

Respondent The Goodyear Tire and Rubber Company states that two publicly held corporations own more than 10% of its stock: Brandes Investment Partners, L.P. and AXA Financial, Inc.

Respondent Monongahela Power Company is a subsidiary of Allegheny Energy, Inc., which owns 100% of its common stock.

Respondent Pennzoil-Quaker State Company (sued as Quaker State Corporation) has no parent company and no publicly traded corporation owns 10% or more of its stock.

Respondent Pharmacia Corporation, formerly known as Monsanto Company, has no parent corporations, and no publicly held companies own 10% or more of Pharmacia Corporation's stock.

Respondent Potomac Edison Company is a subsidiary of Allegheny Energy, Inc., which owns 100% of its common stock.

Respondent West Penn Power Company is a subsidiary of Allegheny Energy, Inc., which owns 100% of its common stock.

Respondent Westvaco Corporation, is a wholly-owned subsidiary of MeadWestvaco Corporation, a publicly held corporation.

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Respondents joining in this brief are among the various premises owner and/or employer defendants in the West Virginia mass asbestos litigation that is the subject of the instant Petition (hereinafter, "Premises Defendants"). Pursuant to Supreme Court Rule 12.6, Premises Defendants submit this brief in support of the Petition for a Writ of Certiorari filed by their co-defendants in the underlying mass trial, Mobil Corporation and Honeywell International, Inc. (collectively, "Mobil"). Each of the Premises Defendants joined in Mobil's petition for a writ of mandamus and/or prohibition to the West Virginia Supreme Court of Appeals, to which the instant Petition to this Court refers. *See* Appendix accompanying Mobil's Petition for a Writ of Certiorari (hereinafter, "Pet. App.") at 157a-161a.

STATEMENT OF THE CASE

Interest of the Premises Defendants

In this brief, Premises Defendants focus on the first question presented by the Petition. For most (but not all) premises and/or employer defendants, the vast majority of the premises liability and employer liability claims involve facilities (and thus alleged asbestos exposures) in West Virginia. Therefore, while Premises Defendants support the Petition on the second question, the *Shutts* issue, this brief is largely limited to the first question presented by the Petition.

Premises Defendants will elaborate briefly on the facts to explain the various types of claims being asserted against them as part of the West Virginia mass trial. Premises Defendants will then address, in Part I, the reasons why this Court should grant the Petition and, in Part II, why this Court should address these questions now, rather than at some later time.

Background and Relevant Procedural History On The Premises Liability And Employer Liability Claims

Premises Defendants have been named as defendants by thousands of plaintiffs in various asbestos cases administered by the West Virginia Mass Litigation Panel ("MLP").[1] Petitioners Mobil and Honeywell (and many other companies) have been named as defendants because they manufactured or distributed at least one product that contained some form of asbestos. Each of the Premises Defendants has been named as defendant by some unspecified number of plaintiffs on a premises liability theory—*i.e.*, that they allowed persons to enter one or more of their West

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[1] The Court will notice throughout this brief that it is difficult for many defendants to state specifically how many plaintiffs there are or in how many cases they have been named in connection with the mass trials scheduled to begin in September 2002.

Virginia industrial facilities over the course of several decades, and thereby allegedly exposed them to asbestos-containing materials used (predominantly as insulation) in those facilities.

In addition, some of the Premises Defendants, which include some of the largest employers in West Virginia, also have been named as defendants by some unspecified number of former employees based on a statutory "employer liability" theory. These claims are based on an exception to the West Virginia workers' compensation bar which permits an employee to sue an employer that "deliberately intended," either actually or constructively, to cause death or serious bodily injury to the employee. *See* W. Va. Code § 23-4-2(c)(2) (West 2002).

The thousands of claims against Premises Defendants, along with the claims against companies that manufactured or distributed products containing asbestos, are set for a mass trial currently to begin on September 23, 2002.[2] Any given plaintiff may have sued any number of different defendants, potentially resulting in uncountable combinations of defendants for particular plaintiffs—depending on which "premises" the plaintiffs claim to have entered, which products with which they claim to have come into contact, or by whom they were employed.

The general outline of the mass trial authorized and approved by the West Virginia Supreme Court of Appeals, as set forth in the trial scheduling order entered by Judge Gaughan on February 26, 2002, is clear. Specifically, under the trial scheduling order, there will be a "first phase" composed of three trials of three different groupings of defendants: product manufacturers and distributors, premises

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[2] It appears that there has never been a "mass trial" of premises liability claims or of statutory employer liability claims either in West Virginia or, indeed, in any other jurisdiction.

owners and employers.[3] Pet. App. at 25a. Each of these three trials is supposed to provide the occasion for a jury to fully determine the "fault" of each of the many defendants in the group vis-à-vis all the plaintiffs. *Id.* at 25a-27a. That fault phase will also set "punitive damages multipliers."[4] *Id.* at 26a. The trial scheduling order also specifically contemplates—indeed, appears to count on—the mass trial setting forcing large numbers of defendants to "settle," thereby simplifying the entire trial process. *Id.* at 27a.

The initial phase determining "fault" is to be followed by a series of mini-trials in which "causation" and damages will be addressed as to particular plaintiffs. *Id.* at 28a. The trial scheduling order suggests that additional settlements are expected to precede the mini-trial phase. *Id.* at 28a-29a.

From prior cases, the Court may have some understanding of the complexity associated with addressing thousands of products liability claims involving a wide variety of asbestos-containing products of dozens of different manufacturers. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). The variety of products, the particular risks associated with each product, and the nature of the exposures of each plaintiff, all bear importantly on the ability to adjudicate even basic questions of liability fairly in that setting. *Id.*

The Court may, however, be less familiar with premises liability claims. Those claims seek to attribute liability to owners of various types of work-sites (*e.g.*, power plants,

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[3] The September 2002 mass trials of the manufacturer/distributor claims and the premises liability claims will be simultaneous. At a hearing on August 12, 2002, the MLP (Judges Recht, Stephens and Moats presiding) indicated that the mass trial of the employer liability claims would begin on December 2, 2002.

[4] The MLP likewise confirmed at the August 12 hearing that the first phase of the mass trial would include the setting of punitive damages multipliers.

manufacturing facilities and chemical plants) that had asbestos-containing materials (typically insulation) in them and which were visited by plaintiffs for some business purpose (*e.g.*, repairs, installations, deliveries). Plaintiffs, allegedly suffering from some asbestos disease or, much more usually, being asymptomatic but possessing some evidence of some form of pleural thickening which could be the result of exposure to asbestos, propose to recover damages from premises owners.

In West Virginia, a premises owner is under a duty to provide business invitees (such as the employees of independent contractors) with a reasonably safe place in which to work and to exercise ordinary care for the safety of such persons. *Sanders v. Georgia-Pacific Corp.*, 225 S.E.2d 218, 223 (W. Va. 1976). A premises owner's liability for breach of this duty depends on numerous case-specific factors, including:

> (1) the foreseeability that an injury might occur; (2) the severity of injury; (3) the time, manner and circumstances under which the injured party entered the premises; (4) the normal or expected use made of the premises; and (5) the magnitude of the burden placed upon the defendant to guard against injury.

Mallet v. Pickens, 522 S.E.2d 436, 447 (W. Va. 1999). Likewise, a premises owner has a duty to warn invitees of defects or dangerous conditions on the premises. This duty depends, in part, on the invitee's own ignorance of those conditions, and on the likelihood that harm would follow, given the time, manner and circumstances under which the particular plaintiff entered the premises. *See Pasquale v. Ohio Power Co.*, 418 S.E.2d 738, 751 (W. Va. 1992).[5]

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[5] In addition, under West Virginia law, the premises owner will not be liable for the harm caused to a third party by an independent contractor or the contractor's employees if the premises owner did not control, or have

The factual variation in the premises liability claims set for the mass trial, which generally involve activities spanning over nearly half a century, is vast. There is, of course, the sheer number of defendant premises owners to contend with. Any given defendant may own (or have owned) one or more premises in the state; any given plaintiff may have worked at numerous such premises owned by various companies. The asbestos-containing material at a particular industrial site may have been isolated to a single location or, much more likely, may have been located in multiple areas of the premises, some of which cover several acres. Concentrations of asbestos will vary widely over the premises; asbestos in one location may have had the potential to become airborne, whereas in other areas it may have been fixed or encapsulated.

There is tremendous variety among plaintiffs as well. The plaintiffs may have visited the premises in different years spanning several decades, for varying lengths of time, and under diverse circumstances, thus creating enormous differences in the extent, duration and nature of their alleged asbestos exposures. For example, some plaintiffs (such as insulators) worked directly with and installed asbestos-containing materials, while others had no such direct contact. Further, some plaintiffs (again, such as insulators) were employed in occupations in which the hazards of asbestos may have been well known.

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the right to control, the contractor's operations. *Peneschi v. National Steel Corp.*, 295 S.E.2d 1, 11 (W. Va. 1982); *Sanders*, 225 S.E.2d at 221. This control issue is typically highly fact intensive and dependent on the particular circumstances of each case. *See, e.g., Burdette v. Columbia Gas Transmission Corp.*, 480 S.E.2d 565, 570 (W. Va. 1996) (focusing, among other things, on the terms of the specific contract between the premises owner and the plaintiffs' employer and the activities and duties of the premises owner's employees assigned to supervise the contractor's work).

The knowledge of any risks associated with asbestos in general, or more importantly, the asbestos present in any particular facility or location in a facility, differed from defendant to defendant. Even for any one defendant, that knowledge evolved over time, from decade to decade and from year to year. Likewise, the steps that a given defendant took to minimize known risks at any one of the various premises differed depending on the premises owner, the type of work involved and the time at issue. "Fault" is *not* a unitary issue even for one defendant—the risks posed by asbestos and liability may vary depending on location, concentration, time period, length and frequency of exposure, as well as each plaintiff's knowledge.

The employer liability claims are equally diverse and both plaintiff- and defendant-specific. To prevail on such a claim, plaintiff must show that his employer deliberately intended to injure him. *See* W. Va. Code § 23-4-2(c)(2)(i). Obviously, proof of actual intent necessarily involves a highly particularized, plaintiff-specific and defendant-specific showing. Moreover, since the key element is "intent," claims against one employer can legally bear little relation to claims against another employer.

Alternatively, the employee can prevail on such a claim by a showing of constructive intent to injure, which showing is satisfied by proof of five plaintiff- and defendant-specific elements:[6] (1) existence of a specific unsafe working condition presenting a high degree of risk of serious injury or death; (2) that the employer had subjective realization of the existence of the unsafe working condition and of the high degree of risk of serious injury or death; (3) that the unsafe working condition was a violation of a state or federal safety

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[6] Notably, each of these elements must be determined by submission of special interrogatories to the jury, *see* W. Va. Code § 23-4-2(c)(2)(ii), effectively barring a "mass" determination of any portion of a constructive intent claim.

statute, rule or regulation or of a "commonly accepted and well known safety standard within the industry or business of such employer;" (4) that the employer nevertheless exposed the employee to such specific unsafe working condition intentionally; and (5) that the employee suffered serious injury or death as a direct or proximate result of such unsafe working condition. W. Va. Code § 23-4-2(c)(2)(ii).

The unlikely nature of the employer claims—that the employer actually intended to harm its employees—and the difficulty in proving such a state of affairs might suggest that few plaintiffs could prevail on such claims. In the ordinary administration of cases, the Court might imagine that the claims would be dismissed early on through summary judgment procedures. But, in the context of this hastily conceived "mass trial"—in which the array of claims, issues and evidence defies comprehension—even the most improbable claims have substantial force, compounded by the sheer number of claims being asserted.

In every respect, the premises liability and employer liability cases reflect the impossibility of combining in any coherent trial the claims of persons who are suing innumerable defendants and who "'were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626 (3d Cir. 1996)).

The Petition sets forth additional details of the mass trial and the decisions of the West Virginia Supreme Court of Appeals imposing that court's vision of a mass trial on the defendants.[7] Yet, in judging the nature and fairness of the

[7] There has been a succession of trial judges charged with trying to implement the West Virginia Supreme Court of Appeals' requirement that the asbestos cases transferred to the MLP be disposed of as speedily as

mass trial, it is significant to note that, with the trial weeks away, there still is no definitive statement of the "common issues" on the premises liability claims that will determine Premises Defendants' fault.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE WRIT SHOULD BE GRANTED BECAUSE THE WEST VIRGINIA SUPREME COURT OF APPEALS HAS ERRED IN ELEVATING AN ASSERTED STATE LAW RIGHT TO EXPEDITIOUS DISPOSITION OF CASES OVER THE DUE PROCESS GUARANTEES OF THE UNITED STATES CONSTITUTION

The Petition squarely presents as the first question whether the West Virginia Supreme Court of Appeals' directives and decisions on the upcoming mass trial comport with minimum due process requirements. That question subsumes two

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possible. On November 17, 2000, the West Virginia Supreme Court of Appeals referred all pending cases to the MLP. By order entered December 20, 2000, the court transferred those cases to the Honorable A. Andrew MacQueen for administration. Judge MacQueen's plan for administering the asbestos cases involved a series of multi-plaintiff "all issues" trials. The Supreme Court of Appeals then replaced Judge MacQueen with a "supervising judge," the Honorable Martin J. Gaughan, instructing him to develop a new trial plan—one which would "commenc[e] all trials no later than July 1, 2002." *See West Virginia ex rel. Allman v. MacQueen*, 551 S.E.2d 369, 377 (W. Va. 2001). In response to that directive, Judge Gaughan developed the current plan—to begin with three "fault" trials and then proceed to consider other issues in sequence—albeit beginning with a September 2002 trial, not a July 2002 trial. On July 9, 2002, the Supreme Court of Appeals disqualified Judge Gaughan (due to his stock ownership in some of the defendant companies), replacing him with the Honorable Arthur M. Recht as supervising judge and appointing the Honorable Booker T. Stephens to assist Judge Recht and preside over a portion of the September 2002 mass trial.

distinct and fundamental errors by the West Virginia Supreme Court of Appeals:

First, the West Virginia Supreme Court of Appeals held that the mass trial it has prescribed is not subject to the traditional restrictions and limitations on aggregating multiple claims by and against multiple parties, as reflected in the usual rules of civil procedure (*e.g.*, Rules 20, 23 and 42), and as elaborated in part in *West Virginia ex rel. Appalachian Power Co. v. Ranson*, 438 S.E.2d 609 (W. Va. 1993) (articulating requirements for Rule 42 consolidation). The court held that those limitations did not apply to a mass trial conducted under the auspices of the Supreme Court of Appeals and West Virginia Trial Court Rule 26.01. In so doing, the West Virginia Supreme Court of Appeals failed to recognize that the procedural rules which it felt free to disregard (and which are similar to the federal rules and rules applicable in every state) encapsulate the historic, minimum preconditions for aggregating cases consistent with basic federal due process requirements.

Second, the West Virginia Supreme Court of Appeals has repeatedly and explicitly conceived of its deadline for trial, and the resulting mass trial, as a means of relieving the burden imposed by these asbestos cases on the West Virginia courts—a means which is justified by a *state* constitutional imperative that "justice" be administered "without delay." *See, e.g., West Virginia ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419, 425 (W. Va. 2002) (citing W. Va. Const. art. III, § 17); *see also* Pet. App. at 24a, 29a (invoking the same constitutional provision to justify the mass trial plan). The court has envisioned its task as one that involves balancing the obligation to afford plaintiffs a prompt adjudication (notwithstanding the extraordinary number of claims) against the due process rights of defendants.[8] In so doing, the court

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[8] The West Virginia Supreme Court of Appeals' fundamental misunderstanding of its constitutional obligations arguably runs much deeper,

has fundamentally mistaken the constitutional task: a *legislature* might well have the power to create a compensation system or other statutory scheme that serves as a substitute for adjudication. But *courts* deal in adjudication only. As such, they are bound to assure that no person be deprived of property without due process of law. They are, therefore, without power to declare that a *state* constitutional commitment to speedy civil justice trumps the federal constitutional requirement that defendants be afforded due process. As a matter of federal supremacy, U.S. Const. art. VI, § 2, Premises Defendants' right to the minimum protection which due process requires must prevail over the state constitutional requirement.

A. The West Virginia Supreme Court Of Appeals Has Improperly Dispensed With The Application Of Procedural Rules That Afford Defendants Due Process Of Law In Connection With The Aggregation Of Cases.

1. In an adjudicatory setting, before liability may be imposed on a civil defendant, if facts are in dispute, due process requires a "meaningful" and fair opportunity to present arguments and evidence in support of one's defense. *See Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"). One might debate at the margins—and they may be

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for it has described the relevant balance as between "the right of the parties [*i.e.*, the plaintiffs] to have access to the judicial system in a reasonably prompt fashion" and the need to avoid "simultaneously grinding the court system to a halt." *Gaughan*, 563 S.E.2d at 424. Nowhere in that calculus does the court even acknowledge the existence of the rights of *defendants* to a more than token opportunity to defend against the torrent of asbestos claims. As this Court has noted, "process which is a mere gesture is not due process." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

wide margins—precisely what is encompassed by a "meaningful" opportunity to defend. But certainly for the Founders, and later for the proponents of the Fourteenth Amendment, "due process of law" surely contemplated the basic sorts of protection associated with a trial, including the opportunity to present a direct and particularized response to individual claims.[9]

2. There is one noteworthy exception to the ordinary rule that a defendant is entitled to an opportunity to defend with particularity. That exception is the class action.[10] In class actions, we permit an issue to be determined against a particular defendant without affording the defendant the opportunity to offer a particularized defense to the claims of each plaintiff. We allow the determination made in the context of one or a small group of representative plaintiffs to apply *as to all plaintiffs*. But we take away that fundamental right to defend each case with particularity only after specific inquiries that assure the fairness of that approach. Those inquiries, embodied in Rule 23, focus on the suitability of the case for class treatment, including the selection of appropriate representative plaintiffs, explicit findings about the typicality of the claims of those plaintiffs, and the existence of

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[9] The Due Process Clause protects defendants as well as plaintiffs, and has long been viewed as "preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed rights.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982) (quoting *Boddie v. Connecticut*, 401 U.S. at 380).

[10] Collateral estoppel principles likewise limit the right to provide a particularized defense to an individual claim. But, as with class actions, collateral estoppel principles halt relitigation of an issue only where the issues in the original and subsequent case are identical and where the original finding was rendered in a proceeding, the quality of which warrants the use of findings from that proceeding in a subsequent case. *See Montana v. United States*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 331 (1979).

questions of law and fact common to all members of the class which predominate over individual issues. *E.g.*, Fed. R. Civ. P. 23. What renders the matter appropriate for such class treatment is that it turns on discrete and definable issues that properly allow findings as to one to apply as to all.

Class action requirements are often discussed in connection with the need to protect absent plaintiffs. But the basic class action inquiry also provides vital protection to the defendant. Issues subject to class determination must be sufficiently well-defined and common to all plaintiffs, and the defendant must be given a full and fair opportunity to defend on such issues, before we would consider allowing determinations with respect to one plaintiff to be generalized to a class – and the defendant deprived of its right to present a particularized defense to each plaintiff's claim.

3. Rules regarding consolidation and joinder (as reflected in Fed. R. Civ. P. 42 and 20 and their state counterparts, *e.g.*, W. Va. R. Civ. P. 42 and 20) rest on a somewhat different premise. Traditional consolidation under Rule 42 is *not* designed to deprive a defendant of its right to present a particularized defense to individual claims. With a consolidation, the right to present a defense to a specific claim may be fully preserved. Indeed, the objective is generally to preserve that right while achieving such efficiencies as are possible by combining more than one claim or case in a single trial. The same applies to joinders under Rule 20.

In allowing consolidation, the courts—applying established rules of procedure common to both state and federal courts—are obliged to provide scrupulous assurance that the proposed combination can be achieved without significant prejudice to the defendant.[11] Thus, requirements of commonality and

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[11] As noted, West Virginia's procedures regarding a court's determination of the appropriateness of a consolidation are set forth in the Supreme Court of Appeals' opinion in *Ranson*, 438 S.E.2d 609.

typicality perform a somewhat different, but no less important, function in consolidated cases than they do in connection with class actions. The court must be mindful of the difficulty that a lay jury will have in trying to make sense of a hodgepodge of difficult factual and legal theories involving variously-situated plaintiffs and defendants over an extended period of time. As the number of relevant criteria and considerations increases, the jurors' task grows exponentially.

Tested under traditional standards for consolidation, conscientious jurists have wrestled with the fairness of combining even a few "asbestos" cases involving long time periods, multiple theories of recovery, multiple sites, multiple products, multiple types of injuries, as well as multiple defendants and plaintiffs. *See, e.g., Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1455 (S.D. Ala. 1992) (finding consolidation of 13 asbestos plaintiffs improper); *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 354 (2d Cir. 1993) (finding consolidation of 48 asbestos claims improper); *In re Seventh Judicial District Asbestos Litigation*, 744 N.Y.S.2d 304 (N.Y. Sup. Ct. 2002) (denying consolidation of four separate asbestos actions due to prejudice to defendants).[12] Indeed, this Court has twice rejected attempts to treat the multitude of asbestos cases as a certifiable class, noting that aggregation of such cases is inappropriate where, as here, "individual stakes are high and disparities among class members great." *Amchem*, 521 U.S. at 625; *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

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[12] Courts have been similarly reluctant to permit aggregation of multiple tobacco cases. *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734, 743 n.15 (5th Cir 1993) (denying class treatment for tobacco claims); *Insolia v. Philip Morris, Inc.*, 186 F.R.D. 547, 550 (W.D. Wis. 1999) (granting severance due to dissimilarity of claims); *Glussi v. Fortune Brands, Inc.*, 714 N.Y.S.2d 516 (N.Y. App. Div. 2000) (reversing order for joint trial of multiple tobacco claims due to prejudicial effect).

4. As demonstrated in the Petition, the West Virginia Supreme Court of Appeals has to this point dispensed with all of the traditional protections associated with class actions, on the one hand, and consolidations, on the other. It has found the traditional inquiries inapplicable because the consolidation for a mass liability trial at issue here, directed by the West Virginia Supreme Court itself,[13] is neither a Rule 23 class action nor a Rule 42 consolidation, and thus does not fall within the purview of either rule. In other words, because the West Virginia aggregations have been conducted under the authority of a state procedural rule heretofore unknown to law—West Virginia Trial Court Rule 26.01—the traditional standards applied to class actions and consolidations, and embodied in those rules, do not apply. *See Allman*, 551 S.E.2d at 374 ("Because the provisions of [Trial Court Rule] 26.01 control the underlying civil action, we do not view this matter as one affected by case law interpreting various rules of civil procedure, including Rules 20, 23, or 42"); *Gaughan*, 563 S.E.2d at 424 ("*Ranson* findings are not required in matters proceeding under [Trial Court Rule] 26.01"). That is a fundamental error because those rules exist in order to afford due process to civil litigants.

It is not sufficient that the court has stated generally that the mass trial should be fair and conducted in accordance with due process. A court must bear in mind the requisites of due process before it embarks upon, and as it establishes procedures for, a "mass trial." They have not been considered here.

States are presumably *not* without power to develop procedures that are neither class actions nor consolidations—perhaps admixtures of both. But the creation of procedural hybrids—if that is what this mass trial is to be—is not a

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[13] *See Allman*, 551 S.E.2d at 377 (ordering the newly appointed supervising judge to set a trial plan that provides for the "commence[ment] of all trials no later than July 1, 2002").

license to dispense with protections afforded defendants under traditional procedural forms. The courts must remain focused on the basic protections due a defendant in a civil action.

The order of the West Virginia Supreme Court of Appeals requiring that these cases be commenced on a date certain (without providing the resources to allow these cases to be adjudicated in a manner consistent with traditional standards) is thus fundamentally unsound and improper. A court directive that in excess of eight thousand cases be taken to trial on a fixed date is permissible *only* if that can be done consistent with the basic requirements of due process. The West Virginia Supreme Court of Appeals' directive in setting a trial date and imposing it on the lower court has fundamentally misconceived the constitutional priorities. The result of the appeals court setting and approving a trial date for *all* asbestos cases, without first considering whether the date can and will be met in a manner consistent with the requirements of due process, is no less arbitrary than the administrative error that deprived a plaintiff of a right to have its claim heard in *Logan*. *See* 455 U.S. at 437 (holding that Illinois Fair Employment Practices Commission's failure to schedule fact finding conference within statutory period could not, consistent with due process, justify extinguishing the plaintiff's discrimination claim).

5. The cases set for mass trial are not being treated as class actions because no one would argue that they could possibly qualify for class action treatment. *See generally Amchem*, 521 U.S. at 624. Similarly, these cases were not consolidated under Rule 42 because no one would suggest that they could meet the standards associated with that rule. A trial involving the claims of more than 8,000 plaintiffs against hundreds of defendants provides no meaningful opportunity to mount a defense to individual claims. Prejudice and confusion is inherent in combining thousands of cases involving complex

and different legal theories, defendants with varying knowledge of the dangers of asbestos, who took varying steps to guard against risk over time, whose premises (and locations within those premises) involved very different degrees of risk, and where the degrees of risk relate very much to the particular circumstances (and frequency of visits to the premises) by any particular plaintiff. The West Virginia Supreme Court of Appeals exempted the mass trial that it initiated from the traditional standards governing consolidation because the mass trial could never satisfy those standards.

On its face, the mass trial "so departs from [the] accepted norm as to be presumptively violative of due process." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993). In light of that presumptive violation, it was incumbent on the West Virginia court to, at a minimum, address the due process issues and establish some method of assuring defendants that their due process interests would be protected. The West Virginia Supreme Court of Appeals has not done so.[14]

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[14] The West Virginia Supreme Court of Appeals' suggestion that it conducted an adequate inquiry into the existence of common questions of law and fact sufficient to justify the aggregation of these thousands of disparate claims for trial when it initially transferred the cases to the MLP under Trial Court Rule 26.01 back in November 2000, *see Gaughan*, 563 S.E.2d at 425, is mistaken. The record of that proceeding demonstrates that the appropriateness of consolidating the asbestos cases for purposes of a *mass liability trial* was not considered, much less established. That issue was referred to the MLP. Further, while Trial Court Rule 26.01 authorizes the aggregation of "personal injury mass tort" cases before the MLP, it does not prescribe a mass liability trial of referred cases. In fact, the Rule is silent as to the particular case management and trial plans which are to be implemented, leaving such plans to the MLP for development. *See* W. Va. Trial Ct. Rule 26.01(b)(1).

B. The West Virginia Supreme Court of Appeals Has Improperly Elevated A State Constitutional Right To Swift Justice Over The Due Process Protections Guaranteed A Civil Defendant.

1. The West Virginia Supreme Court of Appeals has sought to justify the mass trial as part of a balancing of interests in light of a state constitutional right to swift justice. Thus, in fixing a date for trial, the Supreme Court of Appeals has repeatedly referenced the state constitutional command that "justice shall be administered [by the courts] without sale, denial or delay." W. Va. Const. art. III, § 17. *E.g.*, *Gaughan*, 563 S.E.2d at 425. Following its lead, the trial court similarly relied on W. Va. Const. art III, § 17 as justification for the mass trial. *See* Pet. App. at 24a, 29a. Yet neither that provision of the state constitution nor the burden that these suits impose on the state courts, can override the federal directive that no state may deprive a defendant of property without due process of law. The Supremacy Clause makes the proper "balance" clear.

As frequently observed by this Court, the crisis in the courts created by proliferation of asbestos lawsuits might justify any number of *legislative* solutions, perhaps in the form of a compensation program to substitute for traditional adjudication. *See Amchem*, 521 U.S. at 628-29. Legislatures possess the power to originate programs that balance the ultimate interests of assertedly injured persons and those responsible for those injuries in a manner that protects each side's legitimate interests, consistent with "legislative" due process. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995) (noting the power of Congress to create a uniform standard of liability for manufacturers of defective products but decertifying class in mass tort context).

Courts, however, ordinarily lack the power to provide such "legislative" solutions. They must work within the traditional

framework of adjudication. They cannot decree a "compensation program" as a substitute for adjudication. Courts can only provide the assurance that adjudications under their auspices conform to basic standards of due process. The burdens imposed by the ever-burgeoning West Virginia asbestos docket on the courts of that State—while crying out for a legislative solution—do not provide a basis for disregarding minimum due process standards in the context of traditional adjudication. *See Arnold v. Garlock, Inc.*, 278 F.3d 426, 443 (5th Cir. 2001) ("we refuse[] to tolerate deviation from fundamental principles of due process simply because asbestos cases threatened to swamp the resources of the federal courts"). The state constitutional right to justice without delay, repeatedly invoked by the West Virginia Supreme Court of Appeals, cannot outweigh or override the requirements of due process that protect a civil defendant as a matter of federal constitutional right.[15] If such a right to speedy justice is afforded by state law, then the State must provide the *resources* to provide that speedy disposition consistent with due process. The West Virginia judiciary cannot overcome a limitation in its own judicial resources by prescribing a mass disposition of cases that runs roughshod over defendants' federally guaranteed due process rights.[16]

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[15] As this Court has noted, each of the Court's "due process cases has recognized, either explicitly or implicitly, that because 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures . . . .'" *Logan*, 455 U.S. at 432 (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)).

[16] *See In re Federal-Mogul Global, Inc.*, No. 02-1426, 2002 WL 1763923, at *38 (3d Cir. July 31, 2002) (observing that the need to solve the asbestos crisis within the courts cannot justify an end run around the law).

II. THE COURT SHOULD GRANT THE WRIT OF CERTIORARI AT THIS TIME BECAUSE THE ISSUES ARE RIPE FOR REVIEW AND BECAUSE ANY DELAY WOULD EFFECTIVELY INSULATE THE WEST VIRGINIA SUPREME COURT OF APPEALS' ACTIONS FROM REVIEW

The Petition raises important questions warranting issuance of a writ of certiorari. Premises Defendants recognize, however, that this Court must consider whether this is an appropriate time for this Court's intervention, before the "mass trial" has begun. It is. There are at least four reasons that, taken in combination, demonstrate that this Court should intervene now, rather than stay its hand until the "mass trial" has run its course.

1. The issues presented—which address fundamental mistakes in the direction chosen by the West Virginia Supreme Court of Appeals—are ripe and appropriate for review.

a. In finding that the state constitutional imperative of speedy justice is to be weighed by the judiciary against the minimum requirements of adjudicative due process, the West Virginia Supreme Court of Appeals has gone down the wrong path. The issue whether such balancing is acceptable at the expense of minimum federal constitutional standards is fully ripe for consideration.

b. The question whether traditional standards limiting consolidation for trial have a due process component that must be considered in setting up a "mass trial" is likewise ripe for review. In this regard, the statement of the West Virginia Supreme Court of Appeals that it could not consider due process objections until the trial court specified the "common issues," *Gaughan*, 563 S.E.2d at 426, does not warrant this Court's postponement of review. First, the court's suggestion to the contrary notwithstanding, at the time

it issued its decision, the West Virginia Supreme Court of Appeals had before it a clear statement of the "common issues" to be tried in the September mass trial.[17] Second, and more important, the failure of due process at issue here is *not* dependent on any particular formulation of the so-called "common issues." In no uncertain terms, the West Virginia Supreme Court of Appeals has imposed a deadline for resolution of the asbestos cases that requires a mass trial. That mass trial will consist of three trials of three broad categories of claims on the issue of each defendant's "fault." Such a mass trial on "fault" necessarily combines the claims against dozens of defendants, involving numerous sites, locations within sites, types of use on the premises, exposure levels, time periods, and mitigation efforts, all of which bear on both the existence of any duty to any particular plaintiff and whether the defendant acquitted that duty. It is that mass combination of facts and issues that renders the mass trial concept promoted by the West Virginia Supreme Court of Appeals flatly incompatible with due process of law.

2. The Court's intervention also is appropriate at this time because for many, and perhaps most, defendants it is now or never. The pressure on certain defendants to settle can be overwhelming. Indeed, that may be the very purpose of setting the mass trial. One can hardly conceive of a more effective means of forcing defendants to settle than this mass trial. For some defendants, a negative judgment from such a mass trial can have substantial balance sheet consequences, which consequences are not lessened by the hope that this Court will grant certiorari and vacate the judgment.

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[17] The February 26th trial scheduling order entered by Judge Gaughan, which was the basis for Mobil's petition for a writ of mandamus and/or prohibition to the West Virginia Supreme Court of Appeals, clearly identified the purportedly "common issues" which would be the focus of the mass trial. *See* Pet. App. at 26a-27a. More recently, the MLP (on August 12) stated that it was dissatisfied with any existing statement of the common issues for the premises liability claims.

Even if this Court ultimately vindicates the rights of defendants that stick it out to the end, that will be of no solace to those defendants forced to settle. Moreover, the number of settlements may itself significantly change the nature and scope of the trial. (For example, imagine if the pressure to settle resulted in a trial against only a single defendant.) Thus, the basic issues now presented may evade review—but the harm to the defendants will nevertheless have been done.

3. In some cases, this Court might wish to stay its hand in order to give the state judicial system a full opportunity to consider an issue both before, and then after, trial. Here, however, the West Virginia Supreme Court of Appeals has a direct and unique role in promoting this mass trial. It was the direction of the West Virginia Supreme Court of Appeals that set this mass trial in motion when it ordered Judge Gaughan, as supervising judge of the MLP asbestos cases, to commence trial of all MLP asbestos cases by July 2002.[18] *See Allman*, 551 S.E.2d at 377. And, having originated the idea, the Supreme Court of Appeals has shown no inclination whatsoever to waver from it. *See Gaughan*, 563 S.E.2d at 426-27. The West Virginia Supreme Court of Appeals has thus been given repeated opportunities to address the fundamental questions presented by this Petition, and has chosen in each instance to stay the course.

4. Finally, the very nature of the asbestos problem being addressed by the West Virginia courts militates in favor of consideration now rather than later. As so many have observed, while some of the plaintiffs suffer from serious asbestos-related diseases, the cases clogging the dockets are disproportionately populated by unimpaired plaintiffs, complaining of asymptomatic pleural thickening. It is those claims which crowd the docket.

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[18] Judge Gaughan subsequently scheduled the mass trial for September 23, 2002, with the Supreme Court of Appeals' approval. *See Gaughan*, 563 S.E.2d at 426.

It is assuredly not in the interest of the truly ill to travel the long road of a mass trial (justified by the need to dispose of thousands of claims by plaintiffs who are asymptomatic), followed by various appeals, before reviewing the constitutionality of what the West Virginia court has authorized at the risk of being forced to begin again when that judgment is reversed. Indeed, without a mass trial to muddy the docket, the state courts would be free to direct plaintiffs' counsel to disclose who the seriously ill plaintiffs are and proceed to settlement or trial on the claims of the seriously ill sooner rather than later.

CONCLUSION

For all the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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